Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-258
	)	
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

COMMENTS OF THE
BOSTON COMMUNITY ACCESS AND PROGRAMMING FOUNDATION

The Boston Community Access and Programming Foundation is a 501(c)(3) nonprofit corporation established in 1982 to provide public access and community programming to Boston residents. We operate two channels, known as the Boston Neighborhood Network (BNN), on the Boston cable system. Our primary funding comes from Cablevision of Boston.

BNN's access operation provides training and production facilities to Boston residents and institutions wishing to produce programs. We also present staff-produced programming, most notably a daily half-hour neighborhood news program. During our last fiscal year, BNN cablecast 1,326 original access programs, plus 713 original Foundation-produced programs. Including repeats, we cablecast 2,797 *programs*, or 2,319 *hours* of programming.

We work hard to involve ethnic, racial, and linguistic minorities in program production in order to serve the many diverse audiences that comprise our city. Our goal is to make the channel as rich in diversity as the city itself.

We wish to specifically comment on the Commission's proposed regulation, paragraph (d), which would enable a cable operator to prohibit certain types of programming on public, educational, and governmental access channels.

A Solution in Search of a Problem

Before promulgating a rule as far-reaching as the one the Commission proposes, the Commission should first establish that there is a problem that needs to be solved. In fact, neither the FCC nor Congress has shown that any problem exists. The Commission, in its *Notice of Proposed Rulemaking*, gives no information at all about whether or not *any* programming actually exists on access channels that it feels is inappropriate. Congress, in its debate, provided a *single* example: Senator Fowler asserted that access channels are used to solicit prostitution through shams such as escort services and fantasy parties, and Senator Wirth stated that he had seen this material in New York City. *Cong. Rec.*, Jan. 30, 1992, S649-50 (daily ed.). (Even this one example is questionable, since commercial programming is normally carried on *leased* access channels, not public access.)

There are 250 access systems in Massachusetts alone, and literally thousands across the country. To subject *all* of these systems to a complex and burdensome system of regulations because of alleged problems at a single system is a classic case of bureaucratic overkill. What makes this situation more absurd is that, if the alleged programming really does exist in New York City, it could probably be stopped through existing laws dealing with prostitution.

For more than nine years, the Boston Community Access and Programming Foundation has operated one of the nation's largest and most ethnically diverse public access operations. Over this time, we are not aware of any programs that would fall into the categories of prohibited material under the proposed FCC rule, as we understand the rule.

To be sure, we have had programs that were controversial, including some that have offended viewers. We have responded to the issue of "offensive" programming in a way that we feel addresses the legitimate needs of three separate groups: (1) parents who do not want their children exposed to particular programs, (2) adult viewers who would like the opportunity to view a diversity of programs, and (3) producers who are exercising their First Amendment right of free speech.

The process we have devised is as follows: First, we require producers to inform the Foundation, when requesting cablecast time, if a program may be offensive to some audiences or is of a mature nature. The Foundation may require producers to place an appropriate viewer warning at the beginning of these programs. Depending on the nature of the program, the Foundation may also require that the

program be cablecast after 10 p.m. or after 11 p.m. A producer who disagrees with staff decisions on these matters may appeal to a Grievance Committee consisting of three Trustees and two producers.

In fact, there have been *few* disputes, since staff and producers are usually in agreement about the most appropriate time for a program. On two occasions over the past year, the Grievance Committee was asked to decide whether programs were too "offensive" for 10 p.m. time slots. One was a program by an African-American producer of "uncensored" rap music, containing repeated use of an offensive word. The other program was a gay drama, suggesting phone fantasies as the ultimate form of "safe sex." As our most risqué programs, these are the types that would be in jeopardy under the Commission's proposed rule. It is interesting that the programs that would be endangered are programs by and for minority communities—African-Americans and gays.

In Boston, through a community process, we have already accomplished the legitimate intent of the Commission's rulemaking: to minimize the risk that children will be exposed to inappropriate programming. Before subjecting Boston and other access centers to burdensome government regulation, the Commission has an obligation to see whether its goals can and are being accomplished through less intrusive means.

Proposed Rule is Overbroad

The proposed regulation would simply reiterate the language from the Cable Consumer Protection and Competition Act to prohibit "any programming that contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Obscenity has been defined by the courts over the years. The public therefore has at least *some* idea what it means. But the term "sexually explicit" appears to be a new term, never before defined.

In note 11 of its *Notice*, the Commission hints that "sexually explicit" might mean the types of "indecent" programming that the Act says may be prohibited by cable operators over leased access channels, specifically programming that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium."

This interpretation is flawed. The courts have repeatedly ruled that the First Amendment does *not* permit a 24-hour-per-day ban on material that is indecent but

not obscene. *The Commission has an obligation to interpret the law in accordance with the Constitution.* The Commission must interpret the law to say that "sexually explicit" programming means exactly the same as "obscenity."

Courts have faced the issue of indecent communications in various cases dealing with cable television, broadcast radio and television, and telephones. In *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985), the Court of Appeals overturned a City of Miami ordinance prohibiting indecent material on the city's cable system. In *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct. 1281 (1992), the Court of Appeals struck down the FCC's 24-hour-per-day ban on indecent broadcasts over radio and television. In *Sable Communications v FCC*, 492 U.S. 115 (1989), the U.S. Supreme Court ruled that the FCC could not place a total ban on indecent commercial messages (known as "dial-a-porn") over interstate telephone lines. The definition of "indecency" in all three cases was similar to the definition that the Commission apparently believes applies to cable access.

The Supreme Court in *Sable* summed up the constitutional requirement:

> Sexual expression which is indecent but not obscene is protected by the First Amendment . . . The Government may, however, regulate the content of constitutionally protected speech in order to promote a *compelling interest* if it chooses the *least restrictive means* to further the articulated interest.

Sable at 126 (emphasis added). The Court agreed that there *was* a compelling interest in protecting the physical and psychological well-being of minors. However, a 24-hour-a-day ban on indecent material was not a permissible way to achieve that end, since such a blanket prohibition would deprive *adults* of their ability to receive Constitutionally protected speech. The Court cited *Butler v. Michigan*, 352 U.S. 380 (1957), where a law was found to be too restrictive when it "denied adults their free speech rights by allowing them to read only what was acceptable for children. As Justice Frankfurter said in that case, 'Surely this is to burn the house to roast the pig.' " *Sable* at 126, citing *Butler* at 383.

The proposed FCC rule, as its applies to cable access, does not pass either of the two *Sable* tests. First, it does not "promote a compelling interest," since there is no evidence to indicate that any material even *exists* on cable access from which minors need protection. Second, it does not use the "least restrictive means to further the articulated interest." As the Court already ruled in *Sable*, a 24-hour ban does *not* meet this test.

The Commission is indeed proposing to "burn the house to roast the pig"—yet in this case the pig does not even exist.

Less Restrictive Means Are Available

If the Commission determines that there exists an abundance of indecent programs on access television from which children need protection, then there are ways to accomplish this objective that are less intrusive than the Commission's proposal.

Most simply, the problem could be addressed at the local level. The procedure described above for Boston is one such approach. Other access operations may have their own procedures that work equally well.

Additionally, parents who do not want their children exposed to programming on an access channel could use the parental "local-box," which is required to be provide by all cable operators under the Cable Communications Policy Act of 1984 §624(d)(2)(A), 47 USC §544(d)(2)(A). A lock-box is defined as "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber."

Finally, a subscriber has the option of terminating cable service.

The FCC was given a limited power to regulate "indecency" on radio and television because the broadcast media had established a "uniquely pervasive presence" and was "uniquely accessible to children," *FCC v. Pacifica Foundation*, 438 U.S. 726 at 748-49 (1978). The Court in *Cruz v. Ferre,* 755 F.2d at 1420, stated that *Pacifica* did *not* apply to cable television, because cable subscribers have many options —including lock boxes and disconnecting service—to control program viewing by children.

Rule's Vagueness Will Lead to Uneven Enforcement

The wording of the proposed rule does not give cable operators, access channel operators, or access producers a clear sense of what programming is allowed and what is not. While the courts have stated that the FCC definition of "indecency" is not vague when applied to broadcasting, they did so in the context of a single enforcement agency—the FCC—which has over the years developed an elaborate series or policy statements and precedents. This is far different from the case of cable access prohibitions, where determination of whether a program is "sexually explicit" would

be made by literally thousands of individual cable system managers. Many diverse standards will emerge for prohibited programming, based not only on different corporate philosophies, but on the beliefs and prejudices of each individual general manager.

It is almost certain that *some* over-zealous cable operators will misinterpret the Commission's concept of sexually explicit conduct. The burden will be on public access speakers, who will be required to seek court relief to obtain their First Amendment rights. Most public access producers simply have no funds to hire lawyers, and will lose their Constitutional rights for lack of funds.

What is most disturbing is that the types of programming that cable operators are today most eager to eliminate are precisely the types that the First Amendment was created to protect—programs by gays and others with unpopular lifestyles, rap artists and others with "offensive" manners of speech, and "hate" groups and other extremist political groups.

Regulations Would Impose Unfair Burden on Access Producers and Organizations

The "Initial Regulatory Flexibility Analysis" attached to the Commission's *Notice* notes that the regulations would impose new burdens on cable operators—but fails to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers.

The Commission suggests only one idea for a process to actually carry out its proposed rule. In paragraph 14 of its *Notice,* the Commission proposes that producers and access organizations would need to "certify" that every program that was cablecast did *not* contain material prohibited under the Commission rules. Although not stated by the Commission, the certification would apparently be submitted to the cable operator, who would apparently have the right to intercept and black-out any programs that were not so certified. In order to make this certification, independent nonprofit organizations that operate access channels would need to pre-screen all tapes prior to cablecast. In Boston, we would need to allocate staff time to view and evaluate each of the 1,326 individual access programs we cablecast per year, and would need to file a certification with the cable operator for each of them. This imposes a huge new burden of staff work and paperwork on organizations such as ours, which, by their very nature, are already grossly understaffed and overworked.

Furthermore, if the necessary paperwork were not filed for a particular program in a timely fashion, the cable operator might decide to delete that program from cablecast. There are very few, if any, access programs that actually contain material prohibited by the proposed rule. For every program that the cable operator takes off the air for reasons of program content, a far greater number will be taken off for failure to file necessary paperwork.

What will happen to live programming, such as call-in programs, political debates, or coverage of city council meetings? Since the cable operator can never be certain what live programming will contain, will all live programming be banned? Such a blanket prohibition seems a case of prior restraint.

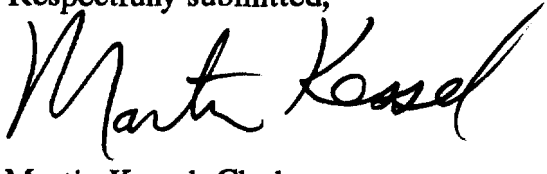
It would be ironic if one of the final actions of the Reagan-Bush FCC—a Commission dedicated to removing unnecessary government regulations—would be to impose a burdensome, vague, and overbroad regulation that addresses a problem that does not exist.

Recommendations

The Commission should rewrite its proposed rule to eliminate the category of "sexually explicit" programming, since that category *must* be interpreted to mean "obscene" programming.

Individual access producers should have the responsibility of determining whether their programming is obscene or promotes illegal activity, but should *not* be required to complete unnecessary paperwork in cases where programs are acceptable.

Respectfully submitted,



Martin Kessel, Clerk
Boston Community Access
and Programming Foundation
8 Park Plaza, Suite 2240
Boston, Massachusetts 02116

December 4, 1992